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previous decisions, and a tendency to conform to the more modern policies of the law.

CONSTITUTIONALITY OF THE NEW YORK TRANSFER TAX UPON TRANSFERS OF PROPERTY BY POWERS.—By the amendment of 1897 to the transfer tax of New York, Chap. 284, Laws 1897, it was provided that the exercise of a power of appointment derived from any disposition of property made either before or after the passage of the Act should be a transfer and taxable. The constitutionality of this amendment has been repeatedly upheld in the state courts. *In re Vanderbilt* (1900) 50 App. Div. 246; reversed, 167 N. Y. 227; *In re Dows* (1901) 167 N. Y. 227; and the latest decision on the point, *In re Delano* (1903) 176 N. Y. 486, has recently been affirmed in the United States Supreme Court, *Chanler v. Kelsey* (1907) 37 N. Y. Law Jour., No. 25, on the ground that it did not involve a taking of property without due process of law. The decisions have been upon substantially the same set of facts: before the passage of the Act, A, deeds or wills property to B for life, remainder over to B's issue, C and D, in fee; but with power in B to appoint the remainder by will between C and D. After the passage of the Act, B dies, and by will appoints the remainder to C. The devise or deed thus, in effect, creates "powers with estates limited in default of their being executed." 2 Sugden, Powers, 33; and in such a case the remaindermen take a vested interest in fee, subject to be divested by the execution of the power. 2 Sugden, Powers, 4; Fearne, Con. Rem. 226. This principle was long ago recognized in New York, *Hawley v. James* (1835) 5 Paige 318, and is now embodied in the Real Property Law, § 31. The donee of the power, B, had no interest in property to devise and his will in the principal case, therefore, did not convey any interest to the appointee as a devise but merely through its operation as a means of executing the power conferred upon him. 2 Sugden, Powers, 26, 33. The execution of the power thus caused a transfer from the remaindermen to the appointee and involved solely a transfer *inter vivos* and not by succession. It would seem immaterial, therefore, whether the power was exercised by will or deed; or that the appointee was a remainderman by the deed creating the power, since "every power operates as a power of revocation and new appointment." 2 Sugden, Powers, 32.

The dissenting opinion by Justice Holmes in the principal case clearly pointed out that the particular tax in question was not a succession tax and held that as the statute provided for a tax on successions and was so considered by the state courts, the amendment was unconstitutional. While some of the New York cases have spoken of the tax as a succession tax, *Matter of Delano*, 176 N. Y. 486, 494; *Matter of Dows*, supra, the decisions have been based upon the correct theory that the appointee took his estate not from the donor but from the remaindermen; *Matter of Dows*, supra; and a transfer *inter vivos* would seem to be properly included in the amendment which covers "Taxable transfers." Chap. 284, Laws 1897. The majority opinion on the other hand while clearly analyzing the method by which the estates were vested and divested, did not seem to treat the tax as one upon transfers *inter vivos*, but simply referred to the conclusiveness of the state decisions upon questions of the

dispositions of property interests by will, without mentioning that, although it is the function of the state courts to construe the statute and the will, the constitutional question as to whether, when so construed, there has been a taking of property without due process of law, still remains for their consideration. *Orr v. Gilman* (1901) 183 U. S. 278. The decision, however, seems clearly correct, on the lines outlined above, and the argument of counsel that the Act involved an incumbrance of the appointee's estate, already vested and derived from the donor of the power, seems without merit.